Halaman Perdana Sdn Bhd & Ors v Tasik Bayangan Sdn Bhd

FEDERAL COURT (PUTRAJAYA) — CIVIL APPLICATION NO 08–783–10 OF 2012 (B)
ARIFIN ZAKARIA CHIEF JUSTICE, ZULKEFLI CJ (MALAYA), RICHARD MALANJUM CJ (SABAH AND SARAWAK), ABDULL HAMID EMBONG AND ZAINUN ALI FCJJ
20 MARCH 2014

Civil Procedure — Judicial review — Striking out of appeal — Jurisdiction of Court of Appeal — Dismissal of application for adjournment of hearing of leave — Whether court bestowed with jurisdiction to entertain case — Whether Court of Appeal had jurisdiction to review its own decision — Whether proper case to exercise jurisdiction — Courts of Judicature Act 1964 s 96 — Rules of the Federal Court 1995 r 137

By way of notice of motion ('the motion'), the applicants sought for review of the decisions of the Court of Appeal and/or of this court, pursuant to s 96 of the Courts of Judicature Act 1964 and/or r 137 ('r 137') of the Rules of the Federal Court 1995 and/or the inherent jurisdiction of the court. The applicants sought for the decision of the Court of Appeal in dismissing the applicants' appeal against the whole of the decision of the High Court be set aside and the appeal be reheard; that the decisions of the Federal Court vide the notice of motion filed by the applicants ('the leave application') in dismissing the applicants' application for adjournment of the hearing of the leave application ('the first decision'); and in dismissing the leave application ('the second decision') be set aside and the leave application be reheard; that the Court of Appeal order dated 7 December 2011 and the High Court judgment dated 29 December 2010 be stayed pending the disposal of this application. The respondent argued that the Court of Appeal had no jurisdiction to review its own decision. Faced with such objection, the applicants applied to withdraw the Court of Appeal review application with no order as to costs. The Court of Appeal thus struck out the review application. Two issues that arose for determination were whether this court had the jurisdiction to entertain it and if so, whether on the facts and circumstances of the case including the arguments submitted by the parties, this was a proper case to exercise such jurisdiction.

Held, dismissing the motion with costs:

(1) Prayer A of the motion was a non-starter and an abuse of the process of the court. It was therefore refused. The Court of Appeal review application was an incompetent application ab initio. The Court of

Appeal was not the apex court in this case. There was therefore no basis in law for the applicants to complain that this court erred in not allowing an adjournment of the leave application pending the disposal of the Court of Appeal review application (see paras 18–19).

(2) As regards the prayer to set aside the first decision, it was obviously not within the ambit of r 137. The grant or refusal of an adjournment was entirely an exercise of discretion by the judges who heard the leave application (see para 21).

(3) To succeed in the motion, the applicants must show that the decisions, in particular the second decision in the leave application, was tainted with bias in the sense that when it was made there was actual or a real danger of bias. The applicants in the motion only averred that their fundamental right to a fair and proper hearing was affected due to a real danger of bias on the part of the Court of Appeal judge who was the presiding judge of the Bench that heard and dismissed the appeal (see paras 26–27).

(4) It could hardly be disputed that when the leave application was heard, the applicants had already made the allegation of bias against the Court of Appeal judge in their review application. There was nothing to prevent them from submitting the allegation of bias before the judges who heard the leave application. Unfortunately they failed to do so. The allegation of bias should have been raised at the earliest opportunity available instead of coming back for review (see paras 28–29).

(5) The applicants could not now say that the decision to dismiss the leave application should be impugned on the ground of bias. In fact there was no allegation of bias against the decision to dismiss the leave application or against any of the judges who heard the leave application. The jurisdiction of this court under r 137 is limited to reviewing its own decision and the basis to do so is also very stringent. It may only allow a review of its own decision in order 'to prevent injustice or to prevent an abuse of the process of the court'. Since in the motion there was no allegation of bias or any reason advanced to impugn the decision of this court dismissing the leave application there was therefore no basis to invoke the power under r 137. The motion failed to meet the threshold requirement of r 137. Thus, prayer B was also refused (see paras 30–33).

[Bahasa Malaysia summary

Melalui cara notis usul ('usul'), pemohon memohon untuk semakan semula keputusan Mahkamah Rayuan dan/atau mahkamah ini menurut s 96 Akta Mahkamah Kehakiman 1964 dan/atau k 137 (k 137) Kaedah-Kaedah Mahkamah Persekutuan 1995 dan/atau bidang kuasa inherens mahkamah. Pemohon memohon terhadap keputusan Mahkamah Rayuan dalam menolak rayuan pemohon terhadap seluruh keputusan Mahkamah Tinggi untuk diketepikan dan rayuan untuk didengar semula, bahawa keputusan

Mahkamah Persekutuan melalui notis usul yang difailkan oleh pemohon (permohonan kebenaran) dalam menolak permohonan pemohon untuk menangguhkan perbicaraan permohonan kebenaran (keputusan pertama); dan dalam menolak permohonan kebenaran (keputusan kedua) untuk diketepikan dan permohonan kebenaran didengar semula, bahawa perintah Mahkamah Rayuan bertarikh 7 Disember 2011 dan keputusan Mahkamah Tinggi bertarikh 29 Disember 2010 ditangguh sementara menunggu untuk penyelesaian permohonan ini. Pemohon berhujah bahawa Mahkamah Rayuan tidak mempunyai bidang kuasa untuk menyemak semula keputusannya sendiri. Berhadapan dengan bantahan tersebut, pemohon memohon untuk menarik balik permohonan semakan Mahkamah Rayuan tanpa apa-apa perintah berkaitan kos. Mahkamah Rayuan membatalkan permohonan semakan. Dua isu yang timbul adalah penentuan sama ada mahkamah ini mempunyai bidang kuasa untuk mendengar kes tersebut dan jika demikian, sama ada fakta dan hal-hal kes termasuk hujahan yang dihujahkan oleh kedua-dua pihak, adalah wajar untuk melaksanakan bidang kuasa itu.

Diputuskan, menolak usul dengan kos:

(1) Permohonan A tersebut bukan pemula dan satu penyalahgunaan mahkamah. Oleh itu ia ditolak. Permohonan semakan Mahkamah Rayuan adalah permohonan yang tidak kompeten ab initio. Mahkamah Rayuan bukanlah mahkamah tertinggi dalam kes ini. Oleh itu tiada asas undang-undang untuk pemohon membuat aduan bahawa mahkamah ini terkhilaf dalam tidak membenarkan penangguhan untuk permohonan kebenaran sementara menunggu pembatalan permohonan semakan Mahkamah Rayuan (lihat perenggan 18–19).

(2) Berkaitan dengan permohonan untuk mengetepikan keputusan pertama, adalah sangat jelas tidak termasuk dalam lingkungan k 137. Kebenaran atau keengganan untuk penangguhan adalah sepenuhnya di atas budi bicara hakim bicara yang mendengar permohonan kebenaran (lihat perenggan 21).

(3) Untuk berjaya dalam usul, pemohon hendaklah menunjukkan bahawa keputusan-keputusan, terutama sekali keputusan kedua dalam permohonan kebenaran, yang telah dicemari dengan berat sebelah dalam erti kata bahawa sewaktu dibuat terdapat bahaya berat sebelah yang nyata atau benar. Pemohon dalam usul itu hanya menegaskan bahawa hak asasi mereka untuk perbicaraan yang adil dan wajar terjejas kerana bahaya berat sebelah yang nyata (lihat perenggan 26–27).

(4) Adalah sukar untuk dipertikaikan bahawa apabila permohonan kebenaran telah didengar, pemohon sudah mempunyai dakwaan berat sebelah terhadap hakim Mahkamah Tinggi dalam permohonan semakan semula mereka. Tiada apa yang dapat menghalang mereka daripada mengemukakan dakwaan berat sebelah di hadapan hakim yang

mendengar permohonan kebenaran. Malangnya mereka gagal berbuat demikian. Dakwaan berat sebelah sepatutnya dibangkitkan pada peluang awal yang ada daripada kembali semula untuk semakan (lihat perenggan 28–29).

(5) Pemohon-pemohon kini tidak boleh mengatakan bahawa keputusan untuk menolak permohonan kebenaran itu harus dipersoalkan atas alasan berat sebelah. Malahan tiada dakwaan berat sebelah terhadap keputusan untuk menolak pemohonan kebenaran atau terhadap mana-mana hakim yang mendengar permohonan kebenaran tersebut. Bidang kuasa mahkamah ini di bawah k 137 adalah terhad untuk menyemak keputusannya sendiri dan asas untuk berbuat demikian juga sangat ketat. Mahkamah hanya mungkin membenarkan menyemak semula keputusannya sendiri untuk 'to prevent injustice or to prevent an abuse of the process of the court'. Memandangkan di dalam usul tidak terdapat dakwaan berat sebelah atau apa-apa sebab dikemukakan untuk meragui keputusan mahkamah ini menolak permohonan kebenaran, oleh itu tiada asas untuk membangkitkan kuasa di bawah k 137. Usul gagal untuk memenuhi keperluan minimum k 137. Oleh itu permohonan B turut ditolak (lihat perenggan 30–33).]

Cases referred to

Abdol Mulok bin Awang Damit v Perdana Industri Holdings Bhd [2003] 4 MLJ 441, CA (refd)

Dato' Abu Hasan bn Sarif v Dato' Dr Abd Isa bin Ismail [2012] 2 MLJ 429; [2012] 2 CLJ 649, FC (refd)

Dato' See Teow Chuan & Ors v Ooi Woon Chee & Ors and other applications [2013] 4 MLJ 351, FC (refd)

Harcharan Singh a/l Piara Singh v PP [2011] 6 MLJ 145; [2011] 6 CLJ 625, FC (refd)

Metramac Corporation Sdn Bhd (formerly known as Syarikat KG Sdn Bhd) v Fawziah Holdings Sdn Bhd; Tan Sri Halim Saad & Che Abdul Daim Hj Zainuddin (Interveners) [2007] 5 MLJ 501, FC (refd)

Sharikat Galian Razak Sdn Bhd v Magical Capital Sdn Bhd [2013] 9 CLJ 141, FC (refd)

Tradium Sdn Bhd v Zain Azahari bin Zainal Abidin & Anor [1995] 1 MLJ 668, CA (refd)

Wong Hon Leong David v Noorazman bin Adnan [1995] 3 MLJ 283, CA (refd)

Yoong Sze Fatt v Pengkalen Securities Sdn Bhd [2011] 4 MLJ 805, CA (refd)

Legislation referred to

Courts of Judicature Act 1964 s 96
Rules of Court 2012
Rules of the Federal Court 1995 r 137

Appeal from: Civil Appeal No B-02–338 of 2011 (Court of Appeal, Putrajaya)

Malik Imtiaz Sarwar (Gobind Singh Deo, Tan Jee Tjun and Pavendeep Singh with him) (Thomas Philip) for the applicants.

K Kirubakaran (Max Yong and S Malar with him) (Kiru & Yong) for the respondent.

Richard Malanjum CJ (Sabah and Sarawak) (delivering judgment of the court):

INTRODUCTION

[1] By way of notice of motion dated 25 October 2012 ('the motion') the applicants, pursuant to 's 96 of the Courts of Judicature Act 1964 and/or r 137 of the Rules of the Federal Court 1995 and/or the inherent jurisdiction of this honourable court, are seeking for the review of the decisions of the Court of Appeal and/or of this court. They pray for the following orders:

(a) that the decision of the Court of Appeal dated 8 December 2011 (in Civil Appeal No B-02–338 of 2011 ('the appeal') which dismissed the applicants' appeal against the whole of the decision of the Shah Alam High Court given on 29 December 2010 (in Civil Suit No MT6(5)–22–35 of 2002) be set aside and the appeal be reheard;

(b) further or alternatively, that the decisions of the Federal Court on 20 September 2012 vide the notice of motion filed by the applicants in Civil Application No 08(f)-6–01 of 2012(B) ('the leave application'):

(i) in dismissing the applicants' counsel's application for adjournment of the hearing of the leave application ('first decision'); and

(ii) in dismissing the leave application ('second decision');

be set aside and the leave application be reheard;

(c) that the Court of Appeal order dated 7 December 2011 and the Shah Alam High Court judgment dated 29 December 2010 be stayed pending the disposal of this application; and

(d) any further and/or other order this honourable court deems fit and/or otherwise appropriate.

[2] While the motion did not categorise the prayers as above, for convenience we have done so in this judgment.

[3] The application was supported by an affidavit of Tan Sri Dato' Abdul Aziz bin Abdul Rahman (No K/P 331003-03-5329).

[4] We heard the arguments and adjourned to consider the points submitted. We have reached our unanimous decision and this is therefore the judgment of the court.

BACKGROUND FACTS

[5] In order to properly understand the grievances raised by the applicants it is helpful to summarise the background facts.

[6] The applicants were the defendants in the Shah Alam High Court Suit No MT6(5)–22–35 of 2002. The High Court adjudged the matter in favour of the respondent on 29 December 2010.

[7] Dissatisfied with the High Court decision, the applicants filed an appeal to the Court of Appeal ('COA'). During the hearing of the Appeal on 8 December 2011 the panel of judges of the COA comprised of Mr Justice Datuk Wira Low Hop Bing (presiding), Mr Justice Datuk Abdul Wahab Patail and Mr Justice Dato' Sri Abu Samah bin Nordin dismissed the appeal ('the COA judgment'). Mr Justice Datuk Wira Low Hop Bing ('the COA judge') wrote the COA judgment.

[8] The applicants then filed the leave application on 4 January 2012 to this court. The leave application was premised entirely on the issues as pleaded before the High Court and the COA.

[9] While the leave application was pending, the applicants filed a review application in the COA on 3 May 2012 ('COA review application') praying for an order that the COA judgment should be reviewed on the ground that there was a real danger of bias on the part of the COA judge when he failed to disclose to the parties that there was 'an unsettling degree of familiarity' between the COA judge and the director of the respondent by the name of Dato' Peter Kuah ('Kuah'). The applicants alleged that there were series of text messages via short messaging service ('SMS') exchanged between the COA judge and Kuah and also between the COA judge and another person by the name of Ms Ooi Suan Kim ('Ooi'). These exchanges occurred between 2 December 2011 and 5 December 2011 that is, before the appeal was heard and dismissed on 8 December 2011.

[10] Prior to the hearing of the COA review application, the leave application was fixed for hearing on 20 September 2012. On 7 September 2012, the then solicitors for the applicants wrote to the registry of this court to ask for an adjournment on the basis that the COA review application was still pending. The solicitors for the respondent opposed the request as contained in

A their letter dated 7 September 2012. In turn, the registry of this court vide its letter dated 12 September 2012 declined to grant the request.

[11] On 14 September 2012 the solicitors for the applicants wrote again to the registry of this court seeking for an adjournment of the hearing of the leave B application on the basis that the COA review application had been fixed on 16 October 2012. In its letter dated 18 September 2012, the respondent was opposed to any adjournment. By its letter dated 19 September 2012 the registry of this court again declined to grant the request.

C **[12]** At the commencement of the hearing of the leave application learned counsel for the applicants again made another attempt to seek for an adjournment in order to allow the COA review application be determined first. The request was again refused and the hearing proper was ordered to proceed. After hearing the parties this court dismissed the leave application.

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[13] On 16 October 2012, the COA review application came up for hearing. Learned counsel for the respondent raised a point on jurisdiction contending that the COA had no jurisdiction to review its own decision. Faced with such E objection, learned counsel for the applicants applied to withdraw the COA review application with no order as to costs. The COA thus struck out the COA review application.

THE MOTION

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[14] In our view there are only two basic questions to consider in the Motion, namely, whether this court has the jurisdiction to entertain it and if so, whether on the facts and circumstances of this case including the arguments submitted by learned counsel for the parties, this is a proper case to exercise G such jurisdiction.

JURISDICTION UNDER R 137

(I) Prayer A

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[15] In respect of the first question we are of the view that it is now settled law that this court has the jurisdiction to review *its own decision* in order 'to prevent injustice or to prevent an abuse of the process of the court'. This court in its recent judgment ruled that 'the inherent power of the court to review its I decision as declared in r 137 is a necessary power which is inbuilt or intrinsic in the court, as the court of justice. This power may be equated to the powers of the courts to dismiss an action for want of prosecution or to the power of court to strike out any pleading or indorsement of any writ in the action under the Rules of Court 2012. This inherent power is derived from the inherent

jurisdiction of the court which is to do justice and to prevent any abuse of process. This power springs not from legislation but from the nature and constitution of the court as a dispenser of justice. And this inherent power can only be taken away by express provision in any written law.' (see *Dato' See Teow Chuan & Ors v Ooi Woon Chee & Ors and other applications* [2013] 4 MLJ 351) (Emphasis added.)

[16] But while this court in *Dato' See Teow Chuan & Ors v Ooi Woon Chee & Ors and other applications* reaffirmed the principle that it has jurisdiction to review its own decisions, it was also made clear by this court in another decision that it has no jurisdiction under r 137 to review decisions of other courts including that of the Court of Appeal. Indeed it was held that *leave for the application of r 137 to review the decision of the Court of Appeal would result in the abuse of process of the court* (see *Sharikat Galian Razak Sdn Bhd v Magical Capital Sdn Bhd* [2013] 9 CLJ 141). Thus, the decision in *Dato' Abu Hasan bn Sarif v Dato' Dr Abd Isa bin Ismail* [2012] 2 MLJ 429; [2012] 2 CLJ 649 (FC) was ruled to have been decided per incuriam.

[17] Notwithstanding the foregoing, it remains the law that 'where the Court of Appeal is the apex court of any particular case in view of s 87 of the Courts of Judicature Act 1964 ('CJA') then it is also clothed with such inherent power' (see *Harcharan Singh a/l Piara Singh v Public Prosecutor* [2011] 6 MLJ 145; [2011] 6 CLJ 625).

[18] As such, the COA review application was an incompetent application ab initio. The COA was not the Apex court in this case. There was therefore no basis in law for the applicants to complain that this court erred in not allowing an adjournment of the leave application pending the disposal of the COA review application.

[19] Hence, prayer A of the motion is a non-starter and an abuse of the process of the court. It is therefore refused.

(ii) Prayer B

[20] We now turn to prayer B of the motion. Basically it is for the rehearing of the leave application. But in doing so the applicants sought to impugn the two decisions of the learned judges of this court who heard the leave application. The first decision was the refusal to grant an adjournment and the second decision was the dismissal of the leave application itself.

[21] As regards the prayer to set aside the first decision we are of the view that

it was obviously not within the ambit of r 137. The grant or refusal of an adjournment was entirely an exercise of discretion by the learned judges who heard the leave application.

[22] At any rate in view of the principle reiterated in *Sharikat Galian Razak Sdn Bhd v Magical Capital Sdn Bhd* granting the adjournment due to the pending COA review application would have been an exercise in futility.

[23] In respect of the second decision, in order to succeed in setting it aside the applicants must overcome the threshold requirement of r 137.

[24] The law governing the application of r 137 is now very well settled. In *Dato' See Teow Chuan & Ors v Ooi Woon Chee & Ors and other applications* the learned Chief Justice in delivering the judgment of this court reaffirmed the view that the inherent power as declared by r 137 'can only be exercised in special or exceptional circumstances'. It was further said that 'the court is mindful of the fact that this inherent jurisdiction must be exercised with circumspection in order to prevent any abuse of the same.' And 'in no circumstances whatsoever, this jurisdiction should be used as an avenue of further appeal'.

[25] The learned Chief Justice went on to say this at paras 17 and 18 of the judgment:

> [17] Zaki Tun Azmi PCA (as he then was) in *Asean Securities* laid down some of the circumstances in which this discretion may be exercised. However, he intimated that the list is not intended to be exhaustive and it is open to the court to determine such application on a case by case basis.
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> [18] From the authorities, it would appear that an application may be allowed on the grounds of:
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> (a) bias (*Taylor & Anor v Lawrence & Anor*);
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> (b) coram failure (*Gurbachan Singh s/o Bagawan Singh & Anor v Vellasamy s/o Ponnusamy*);
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> (c) fraud or suppression of material evidence (*MGG Filial v Tan Sri Dato' Vincent Tan Chee Yioun* [2002] 3 CLJ 577; *Re Uddin*); or
>
> (d) procedural unfairness (*Cassell & Co Ltd v Broome (No 2)* [1972] 2 All ER 849n; [1972] AC 1136).

[26] Reverting to the motion the complaint is primarily based on bias, a ground in which some of the earlier applications under r 137 succeeded. But any allegation of bias must be related to the decisions in the leave application and not the COA judgment. Simply put, to succeed in the motion the applicants must show that the decisions, in particular the second decision in

the leave application, was tainted with bias in the sense that when it was made there was actual or a real danger of bias.

[27] The applicants in the motion only averred that their fundamental right to a fair and proper hearing was affected due to a real danger of bias on the part of the COA judge who was the presiding judge of the bench that heard and dismissed the appeal.

[28] Meanwhile, it could hardly be disputed that when the leave application was heard the applicants had already made the allegation of bias against the COA judge in their COA review application.

[29] And there was nothing to prevent them from submitting the allegation of bias before the learned judges who heard the leave application. Unfortunately they failed to do so. The allegation of bias should have been raised at the earliest opportunity available instead of coming back for review (see *Wong Hon Leong David v Noorazman bin Adnan* [1995] 3 MLJ 283; *Abdol Mulok bin Awang Damit v Perdana Industri Holdings Bhd* [2003] 4 MLJ 441; *Yoong Sze Fatt v Pengkalen Securities Sdn Bhd* [2011] 4 MLJ 805; *Tradium Sdn Bhd v Zain Azahari bin Zainal Abidin & Anor* [1995] 1 MLJ 668).

[30] The applicants could not now say that the decision to dismiss the leave application should be impugned on the ground of bias. In fact there was no allegation of bias against the decision to dismiss the leave application or against any of the judges who heard the leave application.

[31] As discussed above the jurisdiction of this court under r 137 is limited to reviewing its own decision. The basis to do so is also very stringent. It may only allow a review of its own decision in order 'to prevent injustice or to prevent an abuse of the process of the court'.

[32] Some of the instances when this court has allowed the review of its own earlier decisions are listed above. Bias is one of them (see *Metramac Corporation Sdn Bhd (formerly known as Syarikat KG Sdn Bhd) v Fawziah Holdings Sdn Bhd; Tan Sri Halim Saad & Che Abdul Daim Hj Zainuddin (Interveners)* [2007] 5 MLJ 501).

[33] Since in the motion there is no allegation of bias or any reason advanced to impugn the decision of this court dismissing the leave application there is therefore no basis to invoke the power under r 137. In short, the motion failed

to meet the threshold requirement of r 137. Thus, prayer B is also refused.

CONCLUSION

[34] Accordingly the motion is dismissed with costs.

Motion dismissed with costs.

Reported by Afiq Mohamad Noor